PP

v.

SAKSI USOP

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI J
[CRIMINAL TRIAL NO: K45-11-2005]
18 NOVEMBER 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 12(2) and 39A(2) - Possession of methamphetamine - Prima facie case - Whether case proved beyond reasonable doubt - Discrepancy between gross weight of drugs - Whether evidence drugs tampered with - Presumption of physical possession - Whether rebutted - Presumption of knowledge - Whether accused failed to discharge burden placed on him by s. 37(d) of Dangerous Drugs Act 1952 - Whether accused convicted and sentenced*

CRIMINAL PROCEDURE: *Sentence - Possession of drugs - Possession of 187.49 grammes of methamphetamine - Life imprisonment - Whether proper sentence to be passed*

The accused was originally charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking in a dangerous drug to wit 187.49 grammes of methamphetamine. At the end of the prosecution case, the learned judge ruled that the prosecution failed to establish a *prima facie* case against the accused and accordingly acquitted and discharged him of the offence charged but called upon the accused to answer the following charge of possession, an offence under s. 12(2) of the Dangerous Drugs Act 1952. The accused pleaded guilty to the charge and was sentenced to four years imprisonment. The prosecution appealed against the order of acquittal and discharge in respect of the trafficking charge. Subsequently, the Court of Appeal allowed the prosecution's appeal and ordered the accused to enter his defence on a charge under s. 12(2) read with s. 39A(2) of the Dangerous Drugs Act 1952 ('the Act'). The accused claimed trial to the amended charge. The prosecution's case was that on 12 May 2005, at 5pm, Chief Inspector Ederian Masaat (PW2) and a team of police officers in an operation related to drug addicts and traffickers, while making observation at the scene of the crime, saw the accused behaving suspiciously as he came out from a block of

houses. The accused was holding a black plastic bag in his right hand. PW2 and his men drove towards the accused and apprehended the accused when he tried to run away. The black plastic bag carried by the accused was seized by PW2, in which was found five plastic packets each containing white crystalline substances suspected to be methamphetamine. The white crystalline substances found in the five plastic packets were later analysed and confirmed by the chemist (PW1) to contain 187.49 grammes of methamphetamine. The accused, however, testified that he was arrested by the police and was brought to Karamunsing Complex where the police accused him of bringing syabu. He denied the accusation but the police kept saying that he had carried the plastic bag. He denied that the black plastic bag was in his right hand when he was arrested. The defence went on further to argue that there was a difference between the gross weight found by the police and the gross weight found by the chemist and submitted that the actual reason for the difference in the gross weight of the drugs was due to tampering and as such the benefit of the doubt must be given to the accused.

Held (convicting and sentencing the accused to life imprisonment):

(1) The fact that the Court of Appeal ordered the accused to enter his defence for an offence under s. 12(2) of the Act could only mean that they were satisfied that the prosecution had established a *prima facie* case of possession against the accused. Even the trial judge who heard the prosecution case found that a *prima facie* case under s. 12(2) of the Act had been established. The procedure at the conclusion of the trial is prescribed by s. 182A(1) of the Criminal Procedure Code ('the Code'). This provision stipulates that at the conclusion of the trial the court shall consider all the evidence adduced before it and shall decide whether the prosecution had proved its case beyond reasonable doubt. (paras 7 & 8)

(2) The explanation for the discrepancy between the gross weight found by PW2 and the gross weight found by PW1 was that the weighing instruments used were different. As for defence counsel's submission that the drugs had been tampered with, there was no basis, in the absence of evidence, to accede to such allegation. In any case, the Court of Appeal by ordering

the accused to enter his defence for an offence under s. 12(2) read with s. 39A(2) of the Act had clearly accepted PW1's evidence regarding the weight of the drugs. (para 14)

(3) The accused had not rebutted the presumption of physical possession because the plastic bag containing the drugs was in his custody at the time of his arrest. By having custody of the plastic bag he was actually in physical possession of the bag. This court rejected his evidence that he was not carrying the plastic bag at the material time. There was no reason to doubt the prosecution's unchallenged evidence that the plastic bag was carried by the accused when he was arrested. (para 16)

(4) The accused had not adduced any evidence to rebut the presumption of knowledge. The accused had completely failed to discharge the burden placed on him by s. 37(d) of the Act. His defence was nothing more than a bare denial. It is trite law that a bare denial is not sufficient to dislodge the prosecution's case, let alone to discharge a burden of proof. Having found that the accused had failed to rebut the presumption under s. 37(d) of the Act, the accused had failed to cast a reasonable doubt to his guilt. The prosecution had proved its case beyond reasonable doubt. Accordingly, the accused was convicted of the offence specified in the amended charge. (para 16)

(5) Life imprisonment was the proper sentence to be passed to the accused. The accused had come to Malaysia from the Phillipines in 1970, acquired Malaysian citizenship and had raised a family. Instead of being a good citizen he had shown complete disregard for the law. The quantity of the drugs was by no means small. The minimum amount that would attract the penalty under s. 39A(2)(r) of the Act is 30 grammes. The amount in this case was 187.49 grammes, six times more than the minimum. The sentence of life imprisonment was appropriate and fitting to the circumstances of the crime. (para 18)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 ***(refd)***
Hairul Din Zainal Abidin v. PP [2004] 1 CLJ 129 CA ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 FC ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 ***(refd)***
PP v. Ooi Leng Swee & Ors [1981] 1 LNS 109 ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 162, 182A(1)
Dangerous Drugs Act 1952, ss. 12(2), 37(d), 39A(2)(r)

For the accused - Au Bah; M/s Ir Au & Co
For the PP - Jamil Aripin DPP A-G's Chambers

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli J:

[1] The accused was originally charged as follows:

> That you on the 21st day of May 2005, at about 5.45pm on the road adjacent to Block K5, Skim Penempatan Telipok, Menggatal, in the District of Kota Kinabalu, in the State of Sabah, did on your own behalf traffic in a dangerous drug to wit 187.49 grammes of Methamphetamine and that you have thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act, 1952 (Act 234) and punishable under section 39B(2) of the same Act.

[2] At the end of the prosecution case, Justice Ian Chin who heard the case ruled that the prosecution failed to establish a *prima facie* case against the accused and accordingly acquitted and discharged him of the offence charged but called upon the accused to answer the following charge:

> That you on the 21 May 2005, at about 5.45pm on the road adjacent to Block K5, Telipok Resettlement Scheme, Telipok. in the District of Kota Kinabalu, in the State of Sabah did have in your possession a dangerous drug to wit 0.3272 grams of Methamphetamine and that you have thereby committed an offence under section 12(2) and punishable under section 12(3) of the Dangerous Drugs Act, 1952.

[3] The accused pleaded guilty to the charge and was sentenced to four years imprisonment with effect from 21 May 2005.

[4] The prosecution appealed against the order of acquittal and discharge in respect of the trafficking charge and on 27 November 2007 the Court of Appeal allowed the prosecution's appeal and ordered the accused to enter his defence on a charge under s. 12(2) read with s. 39A(2) of the Dangerous Drugs Act 1952 ("the Act").

[5] By the time the defence was called on 28 October 2008 the hearing of the case had been taken over by me. On the hearing date the prosecution pursuant to the order of the Court of Appeal tendered an amended charge which reads as follows:

> That you, on the 21st day of May, 2005 at about 5.45pm, on the road adjacent to Block K5, Telipok Resettlement Scheme, Telipok, in the District of Kota Kinabalu, in the State of Sabah, did have in your possession a dangerous drug 10 wit 187.49 grammes of methamphetamine, and that you have thereby committed an offence under Section 12(2) of the Dangerous Drugs Act 1952 and punishable under Section 39A(2)(r) of the same Act.

[6] The accused claimed trial to the amended charge and chose to give evidence on oath. At the conclusion of the trial I found him guilty and convicted him accordingly and sentenced him to life imprisonment with effect from the date of his arrest.

[7] The fact that the Court of Appeal ordered the accused to enter his defence for an offence under s. 12(2) of the Act can only mean that they were satisfied that the prosecution has established a *prima facie* case of possession against the accused. Even the trial judge who heard the prosecution case found that a *prima facie* case under s. 12(2) of the Act had been established except that he found the weight of the drugs to be 0.3272 grammes only, and not 187.49 as charged.

[8] The procedure at the conclusion of the trial is prescribed by s. 182A(1) of the Criminal Procedure Code ("the Code"). This provision stipulates that at the conclusion of the trial the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt. In *Balachandran v. PP* [2005] 1 CLJ 85 Augustine Paul JCA (as he then was) said that a case is said to have been proved

beyond reasonable doubt only upon a consideration of all the evidence adduced. It is my duty therefore to consider all the evidence before deciding on the guilt or otherwise of the accused.

[9] Before I deal with the defence case it is imperative for me to consider the prosecution's evidence. I am of course relying entirely on the printed script without having the opportunity of seeing the witnesses giving evidence. The prosecution's case is as follows. On 21 May 2005 at 5pm Chief Inspector Ederian bin Masaat (PW2) led a team of police officers in an operation related to drug addicts and traffickers. He said that while they were making observation at the scene of crime he saw the accused walking alone coming out from a block of houses. He was behaving suspiciously and was looking left and right. The accused then walked up the hill at the block of houses. About 20 minutes later he came down the hill using the same route. He was holding a black plastic bag in his right hand and was heading towards the housing block. PW2 and his men then drove towards the accused. When he opened his car door the accused who was on the left side of his car looked frightened. He then introduced himself as a police officer. The accused tried to run away but was apprehended. The black plastic bag the accused was carrying was seized by PW2. Upon checking he found one green plastic bag inside the black plastic bag. Inside the green plastic bag was another pink plastic bag which contained five plastic packets each containing white crystalline substances suspected to be methamphetamine. Later at his office PW2 weighed the five packets witnessed by the accused. He found the gross weight including the plastic packets to be 252.9 grams. PW2's evidence regarding what happened at the scene is corroborated in material particulars by Sargeant Jamir bin Haji Majid (PW3) who was a member of the police team. In particular he confirmed PW2's evidence that the accused was holding the black plastic bag in his right hand when he was arrested. The transcript of evidence does not show that this crucial part of PW2's and PW3's evidence was challenged by the defence. There is no explanation for the failure to cross examine PW2 and PW3 on this point. Their evidence is therefore deemed to be accepted: see *Wong Swee Chin v. PP* [1981] 212 where Raja Azlan Shah CJ (Malaya) said:

A correct statement of the law is that failure of the defence to cross examine the prosecution witnesses on the matter' merely goes to the credibility of their testimony On this point we need only say that there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[10] The white crystalline substances found in the five plastic packets were later analysed and confirmed by the chemist (PW1) to contain 187.49 grammes of methamphetamine, a dangerous drug listed in the First Schedule of the Act. PW1's evidence on this point was also not challenged at all by the defence. On these facts it is not surprising that Justice Ian Chin came to the following conclusion:

I am not unaware that certain discrepancies in the evidence of the prosecution case existed, relating to the gross weight of the substance, the ability to sight the accused on the hill and the arrest of other people but none of them, mi the evidence I have set out earlier can prevent a *prima facie* case from arising for a charge of possession because there is uncontroverted and undisputed evidence that the accused held the bag that contained the methamphetamine.

[11] Since the accused was found in custody and control of the drugs the presumption under s. 37(d) of the Act applies against him. He is presumed to be in possession and had knowledge of the nature of the drug. He is entitled to acquittal if he proves on a balance of probabilities that he was not in possession of the drugs or that he did not know the plastic bag he was carrying contained dangerous drugs. If he fails to discharge this burden he is still entitled to acquittal if his explanation casts a reasonable doubt in my mind as to his guilt because at the end of the day the question is whether the prosecution has discharged its burden of proving its case beyond reasonable doubt. The accused cannot be convicted merely because he fails to discharge his burden of proof. It is not his duty to prove his innocence. The burden throughout is on the prosecution to prove his guilt.

[12] The defence case is as follows. On 21 May 2005 he was arrested by the police by the roadside. He said the police pointed a gun at his head and said "we are police." They then brought him to the Karamunsing complex. At the complex he said the police accused him of bringing syabu on that day. He denied the

A accusation but the police kept saying that he carried the plastic bag. According to him on the morning of his arrest he was doing renovation works on one Indian shop at Telipok from 8am to 11am. He said he was arrested at 3.30pm on his way to the mosque for his assar prayers. In cross examination he denied that
B he tried to run away after the police introduced themselves. He denied he struggled to free himself when the police arrested him. He also denied he was on the way down the hill when he was arrested. He even denied that the black plastic bag was in his right hand when he was arrested. It is clear that his defence is a
C bare denial.

[13] The defence recalled the chemist (PW1) pursuant to s. 162 of the Code for further cross examination on the "admissibility" of the 187.49 grammes of methamphetamine. In answer to counsel
D PW1 testified that other than the five tests that he carried out he did not carry out any oilier lest on the white crystalline substances. But he said that even without conducting any other test lie could determine the physical properties of the substance by visual examination. However he agreed that he could not determine the
E water contents of the substance by visual examination. He said the white crystalline substances were in the form of salt, ie, methamphetamine hydrochloride. He agreed with counsel that common salt will absolve moisture from the room and cause the weight to increase. He added that if salt is kept in a sealed plastic
F bag and kept in a room its weight will not increase. He said he would not know if the weight of the white crystalline substances would increase if kept at room temperature because he did not carry out any test on that. However he confirmed that if a certain amount of the white crystalline substances were kept in a sealed
G plastic bag the weight will remain constant. In re examination he reaffirmed that the white crystalline substances contained 187.49 grammes of methamphetamine.

[14] Mr. Au Bah's contention in the light of PW1's fresh
H evidence is that Justice Ian Chin was wrong in finding that the difference between the gross weight found by the police and the gross weight found by the chemist could be due to passage of time. The gross weight found by PW2 was 252.9 grammes whereas the gross weight found by the chemist was 250.2502
I grammes, a difference of 2.64 grammes. Learned counsel pointed out that there is no evidence to support the learned judge's finding

that the white crystalline substances could lose weight due to passage of lime. In fact, according to learned counsel, the learned judge's finding is now contradicted by PW1 because PW1 testified that the discrepancy was not due to passage of time. Learned counsel submitted that the actual reason for the difference in the gross weight of the drugs was due to tempering and as such the benefit of the doubt must be given to the accused. With due respect I think learned counsel is misguided and has completely misconstrued PW1's evidence. In the first place PWI never said that the discrepancy in the gross weight was not due to passage of time. Neither did he say that it was due to passage of time. What PWI said is that the weight of the crystalline substances would remain constant if put in sealed plastic packets. When PW1 talked about weight increase he was actually talking about the effect of moisture on common salt, not methamphetamine. He was referring to the white crystalline substances as a form of salt. He did not say it is common salt. In any case PW1's evidence is that the weight of both common salt and I he white crystalline substances would remain constant if kept in sealed plastic packets. There is therefore no question of PW1 contradicting Justice Ian Chin's finding. I must say I have difficulty comprehending counsel's argument. In my view the explanation for the discrepancy between the gross weight found by PW2 and the gross weight found by the chemist is because, as explained by PW1, the weighing instruments they used were different. I cannot see how the fresh evidence of PW1 could be of assistance to the defence in any way. As for counsel's submission that the drugs had been tempered with I do not find any basis, in the absence of evidence, to accede to such allegation. In any case the Court of Appeal by ordering the accused of enter his defence for an offence under s. 12(2) read with s. 39A(2) of the Act had clearly accepted PW1's evidence regarding the weight of the drugs. Besides, we are not here talking about a big difference in the weight of the drugs. The difference is only 2.64 grammes. In *Hairul Din Zainal Abidin v. PP* [2004] 1 CLJ 129 there was a difference of 26 grammes in gross weight of the drugs between the evidence of the chemist and the police. Mokhtar Sidin JCA said this at p. 135:

> In my view, the appellant was given the benefit of the doubt when the nett weight stated in the charge was the lesser weight. Even with this lesser weight, the cannabis found to be in possession of the appellant far exceeded the prescribed weight of cannabis under section 39A(1)(f) which is 50 grammes. I see no merit in the submission of the appellant's counsel.

[15] The defence did not call another expert to challenge PW1's findings. In this regard what the Federal Court said in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 as follows is relevant:

> in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of the substance, the court is entitled to accept the opinion of the expert on the face value, unless it is inherently incredible or the defence calls evidence by another expert to contradict the opinion.

[16] Now back to the accused's evidence. His defence is not that he had no knowledge about the drugs. Rather his defence is that he did not carry the black plastic bag. In other words the accused's defence is that the plastic bag was not in his physical possession at the time of his arrest. There are two presumptions under s. 37(d) of the Act, namely possession and knowledge. The accused is in fact rebutting the first of the two presumptions. The question is whether the presumption of possession includes the presumption of knowledge or whether it is confined to physical possession. The word "possession" is not defined in the Act. In *Chan Pean Leon v. PP* [1956] 1 LNS 17 Thompson J held that to constitute criminal possession both the physical and mental element must be present. Bearing in mind the meaning of criminal possession given in *Chan Pean Leon, supra,* I am of the view that the presumption of possession in s. 37(d) of the Act means physical possession only because the other element of criminal possession, namely knowledge is presumed separately in the same provision. Has the accused rebutted the presumption of physical possession? I do not think so because the plastic bag containing the drugs was in his custody at the time of his arrest. By having custody of the plastic bag he was actually in physical possession of the bag. I reject his evidence that he did not carry the plastic bag at the material time. I have no reason to doubt the prosecution's unchallenged evidence that the plastic bag was carried by the accused when he was arrested. The accused has

not adduced any evidence to rebut the presumption of knowledge. Be that as it may I have considered his evidence carefully and I find that he has completely failed to discharge the burden placed on him by s. 37(d) of the Act. His defence is nothing more than a bare denial. It is trite law that a bare denial is not sufficient to dislodge the prosecution's case, let alone to discharge a burden of proof: *PP v. Ling Tee Huah* [1980] 1 LNS 212. The accused gave me the clear impression that having been caught red handed with the drugs he now has to try to convince the court that the prosecution's evidence is untrue. Having found that the accused failed to rebut the presumption under s.37(d) of the Act I went on to consider whether his explanation though rejected has cast a reasonable doubt in my mind as to his guilt and I find that that he has failed to do so. I am satisfied that the prosecution has proved its case beyond reasonable doubt. Accordingly the accused was convicted of the offence specified in the amended charge.

[17] As for the sentence it is my considered view that life imprisonment is the proper sentence to be passed on the accused. Peddlars of death and destruction like him should not expect any mercy from the court. The public especially the young must be protected from the accused and the like. In *PP v. Ooi Leng Swee & Ors* [1981] 1 LNS 109 Suffian LP made the following observation:

> It is true that all accused are first offenders. But drug addiction has been rampant for many years, and has reached very serious proportions. It is notorious that many addicts are young persons, many of them innocent children of decent families.
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> Many addicts because of their craving are driven to commit crimes, in order to acquire money desperately needed to buy dadah; and almost daily we read reports of young men on motorcycles snatching ladies handbags in town in broad daylight or worse. Many of these addicts are eventually destroyed by the deleterious effect of the drugs which they arc not able to shake off, but before that lamentable event they go through living death.

[18] That was said almost 30 years ago. But the drug menace is showing no sign of abating. It is obvious that these drug offenders are not the least deterred, not even by the death sentence. The prevalence of the offence and the great harm it has caused and is still causing to society must outweigh all other considerations in meting out sentences for this type of offence. What could possibly

A mitigate the offence committed by the accused? He came to Malaysia from the Phillipines in 1970 and has now acquired Malaysian citizenship and has raised a family. He has been issued with a Mycard with, strangely, Seremban Negeri Sembilan as his address. Instead of being a good citizen he has shown complete
B disregard for the law. At 49 years of age when he committed the offence he should be old enough to understand the consequences of his action and the damage it could do to society. The quantity of the drugs is by no means small. The minimum amount that will attract the penalty under s. 39A(2)(r) of the Act is 30 grammes.
C The amount in this case is 187.49 grammes, six times more than the minimum. Had it not been for his age 1 would have ordered him to be given ten strokes of the rotan. He has escaped a more severe punishment. Therefore in my view the sentence of life imprisonment is appropriate and fitting to the circumstances of the
D crime. It may not have the desired deterrent effect but let it be known to potential offenders that this is the kind of punishment they will get if they tempt fate and get caught.

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